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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 92

WILLIAM M. MITCHELL, ADMINISTRATOR OF THE ESTATE OF KIT C. KOGER, PETITIONER

v.

NEW ENGLAND MUTUAL LIFE INSURANCE COMPANY, RESPONDENT

RESPONDENT'S BRIEF OPPOSING CERTIORARI

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v.

NEW ENGLAND MUTUAL LIFE INSURANCE COMPANY, RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

PRELIMINARY

As the petitioner, William M. Mitchell, Administrator of the Estate of Kit C. Koger, is referred to in the petition and supporting brief as the "plaintiff" and

the respondent, New England Mutual Life Insuran Company, is referred to as the "defendant", the sa designation will be followed herein.

OPINIONS OF COURTS BELOW

The opinion of the District Court was written District Judge A. D. Barksdale and filed October 3 1940. It appears on pages 13-20 of the record and not reported in Federal Supplement. The opinion the Circuit Court of Appeals (Circuit Judges Park Soper and Dobie, Judge Parker writing) was filed Ma 10th, 1941, and appears on pages 24-33 of the reco It is reported in 118 Fed. (2d) 414.

JURISDICTION

The order of the Circuit Court of Appeals which under consideration is dated March 10th, 1941 (R. 3 It reversed a judgment for the plaintiff on the ple ings and remanded the case for trial on the merits. T petition for writ of certiorari was filed May 20th, 1941

The jurisdiction of this Court is invoked under U. S. C. A., Section 347.

STATEMENT OF THE CASE

As the plaintiff's summary statement of the c (petition, 1-4) is substantially correct, it is adopted the defendant. The plaintiff's reference (third pa graph, petition, 2) to the defense asserted by the ans is not clear, but the last three words of the paragr probably resulted from a typographical error. The fendant alleged in its answer that the insured commi suicide by shooting himself through the chest wit shotgun and that suicide less than two years after

issuance of the policies constituted a complete defense to this action. The position of the plaintiff is that as death occurred more than one year after the issuance of the policy, the Virginia one-year "incontestable" statute precluded the defendant from asserting the defense of suicide notwithstanding the fact that the same statute contained a two-year "suicide" clause.

QUESTION PRESENTED

The question involved is: Under the law of Virginia is the defense of suicide available to the defendant in an action on a life insurance policy which had been in effect more than one year but less than two years and which contained the suicide and incontestable clauses quoted at page 3 of the petition?

THE ARGUMENT

(A) In Holding that Defendant's Suicide Clause Complies with the Virginia Statute, Circuit Court of Appeals Applied Virginia Law

The Circuit Court of Appeals has not "decided an important question of local law in a way probably in conflict with applicable local decisions." On the contrary, in holding that the defendant's suicide clause is a valid limitation of liability under Section 4228 of the 1936 Virginia Code, the Circuit Court of Appeals followed all applicable Virginia decisions. The "decision" in *United Security Life Insurance & Trust Company* v. *Massey*, 159 Va. 832, 164 S. E. 529, 167 S. E. 248, 85 A. L. R. 306, which involved the breach of a promissory representation and not a limitation of liability, is not in point. The portion of that opinion relied upon by

the plaintiff was "mere" *dictum* that does not have even persuasive value because of the later "decision" in *Darden* v. *North American Benefit Association*, 170 Va. 479, 197 S. E. 413.

(*1*) *Defendant's Suicide Clause Is a Valid Limitation of Liability Under Virginia Code Section 4228*

As the opinion of the Circuit Court of Appeals is considered a complete answer to the plaintiff's "Point A" (brief, 10-25), it will be quoted from at length.

The statute determinative of the rights of the parties is Section 4228 of the Virginia Code of 1936, which is quoted in the petition (3-4). This statute, which limits the "incontestable" period to one year, also provides that "if there shall be an express provision in the body of such policy limiting the liability of the insurer in the event that the insured shall, within two years from the date thereof, die by his own act (whether sane or insane), such provision shall be valid but the insurer shall be obligated to return, or pay, at the least, the amount of the premiums paid on account of such policy." Each policy provided that in the event of suicide within two years "this Policy shall be void and shall have no value; but in such event the Company will return any premiums paid." (R. 11)

The defendant earnestly contends that its suicide clause complies with the Virginia statute. It is limited to two years; it contains an agreement to refund the premiums paid; and the effect of it is to limit the liability of the company to the return of said premiums paid in the event of suicide within two years.

In construing the statute it should be remembered, as pointed out by Judge Parker (118 Fed. (2d) at 416, R. 25), "that under the common law of Virginia it had been decided that there could be no recovery on a life insurance policy in case of suicide. Security Life Ins. Co. of America v. Dillard, 117 Va. 401, 84 S. E. 656, Ann. Cas. 1917D, 1187. The statute quoted was, therefore, in derogation of this common law rule; and the proviso relating to suicide, the purpose of which was to preserve the common law rule for the limited period of two years where provision to that effect is contained in the policy, should be given a liberal and not a strained construction."

Judge Parker then said (118 Fed. (2d) at 417, R. 25-26):

> "The question in the case, then, is whether the suicide clause quoted above is a provision 'limiting the liability of the insurer in the event that the insured shall, within two years from the date thereof, die by his own act', within the meaning of the proviso of the statute. If it is such a provision, the defendant is clearly not liable under the policies, notwithstanding the incontestability clause; for as the statute provides for a two year suicide clause and requires a one year incontestability clause, it could not have been intended that the latter should cut short the period provided by the former. If it is not such a provision, the statute precludes the defense of suicide, irrespective of the provisions of the incontestability clause. This being true, it is unnecessary to consider the cases dealing with the effect of the incontestability clause on defense under the suicide clause. See notes 55 A. L. R. 549, 67 A. L. R. 1364. *The law of Virginia is, of course, controlling;* and, as the question is one of the interpretation and application

of a state statute, this would be true irrespective of the overruling of Swift v. Tyson, 16 Pet. 1, 10 L. Ed. 865, by Erie Railroad Co. v. Tompkins, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188, 114 A. L. R. 1487.

"*It is perfectly clear, we think, that any language showing that liability of the insurer under the policy shall not extend to death from suicide and that, in such event, the premiums paid on the policy shall be returned, is a sufficient compliance with the requirement of the statute.* The purpose of language is to convey thought; and the thought that liability is so limited that, in the event of suicide, the face of the policy will not be paid but the premiums will be returned is quite as well expressed by language to the effect that, in case of suicide, the policy shall be void and the premiums shall be returned as this same thought would be expressed by a provision that suicide is not a risk covered by the policy or that liability under the policy shall not extend to suicide. *The idea that there is any magic in a particular phrase or that a set form of words must be used to embody such a contractual provision as this, is one which has no place in modern legal thinking.* A policy of insurance is the contract of the parties in which the promises of the company are definitely set forth; and a provision to the effect that, in case of suicide, a life policy shall be void, is as definite a statement as could possibly be made that the coverage of the policy does not extend to suicide or, what is the same thing, that the liability of the company is so limited as not to cover suicide."

(Italics supplied)

The plaintiff has based his whole case upon what was actually "mere" *dictum* in the *Massey* case, *supra*, page 3. He is not relying on those decisions (minority

view) to the effect that there is a conflict between the "incontestable" and "suicide" clauses. For the reasons given by Judge Parker in the foregoing quotation, it is not necessary "to consider the cases dealing with the effect of the incontestability clause on defense under the suicide clause." (118 Fed. (2d) at 417, R. 26.) But it is interesting to note that those courts which hold that there is a conflict between the two clauses and those which hold that there is no conflict do not base their decisions upon any difference in phraseology of the clauses. In neither line of authority "has the question been thought to depend upon the language of the suicide clause." (118 Fed. (2d) at 417, R. 27; see cases there cited in footnote)

Continuing, Judge Parker said (118 Fed. (2d) at 417-418, R. 27-29):

> " * * * That such a clause as the one here involved is definitely a limitation of liability, however, was the holding in Moore v. Bankers' Credit Life Ins. Co. 223 Ala. 373, 136 So. 798. The exact wording of the clause there was that in case of suicide within two years 'this policy shall be valid only for an amount equal to the premiums received'. The court in holding that there was no conflict between the suicide and incontestability clauses, said: 'We rather construe the policy as simply meaning that, if the insured died by his own hand within the two-year period, the beneficiary should receive only the amount represented by the premiums paid, and this regardless of the date of the institution of the suit, for the suicide clause expressly discloses such was the full extent of the risk assumed during that period.' "

It was admitted by the plaintiff in the lower courts that although the language of the policy in *Moore* v. *Bankers' Credit Life Ins. Co.*, 223 Ala. 373, 136 So. 798, discussed by Judge Parker, *supra*, page 7, "is not identical with that of the policies here involved, we can see no real distinction between the two * * * ." (Appellee's brief in Circuit Court of Appeals, 5)

In regard to the plaintiff's contention that the defendant's suicide clause was not a limitation of liability or exclusion of death by suicide from the coverage of the policy but on the contrary was a condition subsequent, Judge Parker said (118 Fed. (2d) at 418, R. 29):

> "The contention that the suicide clause here is a mere condition subsequent, breach of which may avoid the policy but which does not amount to a limitation of liability, will not bear analysis. The clause relates, not to matters affecting the risk, but to the risk itself. *Breach of a condition subsequent avoids the policy so that it no longer covers the risk insured against; but where a life policy contains a suicide clause, suicide is simply not a risk insured against in the first instance.* A life policy promises payment in case of death; and the office of the suicide clause in such a policy is to except death by suicide from that promise. *It is clear, therefore, that the suicide clause, whether it provides that the policy shall be void in case of suicide or that suicide is not a risk covered, is necessarily a limitation on coverage.* Its effect is to except death by suicide from the promise to pay the amount of the policy in case of death.
>
> "*We find nothing in the Virginia authorities to the contrary.*"
>
> (Italics supplied)

It is submitted that the logic of Judge Parker's opinion is unanswerable. It shows that the defendant's suicide clause complies with Section 4228 of the Virginia Code in that it is a valid limitation of liability. As will be shown, the decision of the Circuit Court of Appeals is also in accordance with the interpretation which the Virginia court has placed upon the statute.

(2) *Virginia Rules of Construction*

It is well settled in Virginia that in construing an insurance contract, each provision must be accorded its reasonable, natural and probable meaning when considered in relation to the whole. Under the guise of construction the court should not make a new contract for the parties.

Ayres v. *Harleysville Mutual Casualty Company*, 172 Va. 383, 2 S. E. (2d) 303, plaintiff's brief, 11, is cited in support of the proposition that *ambiguous* language must be construed against the insurer, but the Virginia court there recognized that the court will not "make a contract for the parties which they did not make for themselves and never intended to make." (172 Va. at 389, 2 S. E. (2d) at 305) See also *Harmon* v. *Farm Bureau Mutual Automobile Ins. Co.*, 172 Va. 61, 200 S. E. 616, and the *Darden* case, *supra*. In the latter case the court said (170 Va. at 482, 197 S. E. at 415): "When the terms and provisions are clear, there must be given to such terms and provisions the construction and effect consonant with the apparent object. The contract of insurance is to be considered and construed as a whole."

In *Kennard* v. *Travelers Protective Association*, 157 Va. 153, 159, 160 S. E. 38, 40, the Virginia court said:

> " 'Policies of insurance, as other contracts, should be construed "according to the ordinary sense and meaning of the terms employed, and, if they are clear and unambiguous, their terms are to be taken in the plain, ordinary, and popular sense." *St. Paul Fire & Marine Ins. Co.* v. *Ruddy* (C. C. A.) 299 F. 189, loc. cit. 193.' *Callen* v. *Massachusetts Protective Ass'n* (C. C. A.) 24 F. (2d) 694, 695."

It is submitted that if the foregoing rules of construction are applied to the defendant's policies, the conclusion is inescapable that they comply with the Virginia statute.

(3) *Doctrine of United Security Life Insurance & Trust Company* v. *Massey*

After reaching the conclusion that the defendant's suicide clause complied with the Virginia statute and after stating that there was no Virginia law to the contrary, Judge Parker said (118 Fed. (2d) at 418-419, R. 29-30):

> " * * * Plaintiff relies upon a dictum in the case of United Security Life Ins. & Trust Co. v. Massey, 159 Va. 832, 164 S. E. 529, 167 S. E. 248, 250, 85 A. L. R. 306. That case was one involving a promissory warranty against engaging in a forbidden occupation. The holding was that the incontestability clause forbade a contest based upon breach of this condition. While language was used indicating that this would be the proper holding if breach of condition related to the suicide clause, *the mind of the court was not directed to that point and no account was taken of the limitation of coverage necessarily involved in such a clause.* The court apparently assumed, in the language relied on, that suicide merely

defeated liability under the policy as upon a condition broken, overlooking the fact that the necessary effect of the suicide clause was to exclude liability in case of suicide. *The court did, however, use language clearly indicating that the principle of the case should apply only to cases where there was a denial of liability because of a condition broken*, saying: 'Forfeitures defeat an existing right, but a right which never existed can never be forfeited, and this is the distinction between those policies which declare that certain risks are not assumed and those which declare that they may be defeated by some subsequent happening.' Here the risk of death from suicide was never assumed, for the provision was that the policy should be void in such event and the only liability then existing should be the repayment of premiums. *This is very different from the case of a warranty not to engage in a forbidden occupation.* There the liability for death attaches upon the issuance of the policy and is defeated by breach of the condition. *Here liability for death from suicide within two years is precluded by express provision of the policy itself.*"

(Italics supplied)

The facts in the *Massey* case and those in the instant case are entirely different. The insured was there engaged in railway service, a prohibited occupation, when the policy was issued, and he continued at that occupation. As he violated a promissory warranty, the company had the right at any time within a year after the issuance of the policy to bring a suit for rescission. If he had died within a year from *any* cause, the company could have "contested" the *validity* of the policy under Section 4228 of the Code. The very act of working for the railroad rendered his policy voidable. All of his rights were terminated by the terms of the policy and this was true regardless of what caused his death. But

as he died more than one year after the issuance of the policy, Section 4228 of the Code prevented the company from contesting the validity of the policy.

In the instant case, however, the insured had full life insurance protection at all times, subject to the limitation that if he committed suicide within two years, the liability of the company was limited to the return of the premiums paid. As Judge Parker pointed out, the risk of death from suicide was never assumed under the policies involved in this case. That fact distinguished it from the *Massey* case, which involved the breach of a promissory warranty, and made the principle of the *Massey* case inapplicable.

All that the Virginia court decided in the *Massey* case was that there had been a breach of a condition subsequent for which the company could have brought a suit for rescission within a year after issuance of the policy but that Section 4228 of the Code precluded the company from "contesting" the policy after it had been in force for more than a year. The decisions relied upon by the Virginia court indicate that all that it was deciding was the distinction between (1) a risk not covered by the policy—regardless of the manner in which the risk was excluded—and (2) facts which justify rescission of the policy. The language used by the Virginia court should be limited to the facts of that case. What it said in regard to suicide was "pure" *dictum*.

The District Court in this case recognized that the court in the *Massey* case did not *decide* the question here involved. It expressly said that the suicide clause "was not involved" in the *Massey* case (R. 16). District Judge Barksdale continued (R. 17):

"It is true that the *Massey* case is not a precise adjudication of the question here involved. It was not necessary for the court, in deciding the *Massey* case, to consider the suicide clause in the policy. *As a matter of fact, the suicide clause in the Massey policy failed to comply with the provisions of Section 4228 in that it contained no provision for the return of premiums and this phase was not considered by the court.*"

(Italics supplied)

Certain inaccurate and misleading statements in plaintiff's brief will now be considered. He says (brief, 22) with reference to the *Massey* case, "The sole question was the effect of certain language in the policy identical with that contained in the policies here in issue." The policies are entirely different. The one in the *Massey* case provided that if certain promissory warranties were broken, the policy would be "void". But in the instant case the policy provided that in case of suicide within two years, "this Policy shall be void and shall have no value; *but in such event the Company will return any premiums paid.*" (R. 11; italics supplied) The plaintiff has conveniently ignored the italicized portion of the clause, having referred to it only once (summary statement, petition, 3).

Again he says (brief, 22) that by relying upon the opinion of Judge Cardozo (in *Metropolitan Life Insurance Co.* v. *Conway*, 252 N. Y. 449, 169 N. E. 642) the Virginia court "expressly held that a suicide clause that makes a policy 'void' is not a limitation as to coverage but is a provision for a forfeiture." Such a clause is not here involved. Judge Cardozo there pointed out that if there is a real forfeiture, the insured loses the privilege of receiving the surrender value of the policy

or the equivalent benefits. But if there is a limitation of liability, the privilege of receiving the benefits survives to the extent stated in the policy. In the instant case the defendant was obligated to return the premiums paid.

The plaintiff makes a similar inaccurate statement when he says (brief, 20) that the Virginia court in the *Massey* case distinguished between the effect of "language used in the policies here in question" and those policies which say that suicide is a risk not assumed. Although he quotes a portion of the defendant's suicide clause, he again omits that portion of the clause that shows that it is a limitation of liability and which also shows that it is entirely different from the policy in the *Massey* case.

One would think from reading the plaintiff's brief (17) that the quotation from the *Massey* case beginning with the paragraph numbered "(9)" is from the original opinion, as is the paragraph immediately preceding it, but such is not the case. It is from the opinion on the petition to rehear. The same mistake occurs on page 19 of plaintiff's brief. It is to be noted that in its second opinion in the *Massey* case the Virginia court recognized that "an insurance company is not liable for a loss not covered by its policy." (159 Va. at 850, 167 S. E. at 249)

The *dictum* in the *Massey* case on which the plaintiff relies was qualified by the "decision" in the later *Darden* case, *supra*, page 4 which will next be discussed.

(*4*) *Massey "Dictum" Qualified by Darden "Decision"*

Judge Parker said (118 Fed. (2d) at 419, R. 30-31):

"In a later case, Darden v. North American Benefit Association, 170 Va. 479, 197 S. E. 413, 416, *the point, we think, was directly involved and the holding was in accordance with the view that we have taken.* In that case the policy provided that the beneficiary should be entitled to the payment of only one-fifth of the amount otherwise due if the insured died of heart disease having its incipiency within two years from the date of the policy. In holding this to be a limitation of liability not affected by the incontestability clause, the court said: 'The facts in the instant case are wholly different from those in the case of United Security Life Insurance & Trust Company v. Massey, supra. *There a distinction was made between facts which might have warranted a rescission of the contract and those cases involving risks not covered by the contract.* In the instant case there are original reservations and an exemption to a certain extent from the risk assumed. The contract before us neither provides for a forfeiture nor sets up conditions subsequent. The contest here relates to the coverage, and not to the validity of the policy. The defendant is not contesting the policy because of anything occurring in its incipiency. It is relying upon its contract, and as has been aptly said, a reliance upon its contract does not constitute a contest of its validity, but necessarily assumes it.' *Here, as in that case, the contest 'relates to the coverage and not to the validity of the policy.'* The defendant is relying upon the contract, and a reliance upon the contract 'does not constitute a contest of its validity, but necessarily assumes it'. *There can be no distinction in law or in reason between a provision to the effect that upon certain conditions one-fifth only of the face of the policy shall be payable and one to the effect that upon certain conditions the promise of the policy to pay the face amount shall be void and the premiums paid shall be returned.* In either

case, there is a limitation of the liability of the insurer expressed in the face of the policy, not a warranty or condition upon breach of which a liability assumed may be forfeited.

> *"In the light of the decision in the Darden case, we do not think that the dictum in the Massey case upon which plaintiff relies has even persuasive value."*
>
> (Italics supplied)

It will be noted that the Circuit Court of Appeals was of the opinion that the point here involved was directly before the Virginia court in the *Darden* case and that the judgment rendered in the instant case was in accordance with the view adopted by the Virginia court. Under the circumstances Judge Parker thought, and correctly so, that the *dictum* in the *Massey* case did not have even persuasive value.

In his "Point A" (brief, 10-25) which deals with the Virginia law, the plaintiff discusses in detail the *Massey* case, but not once does he refer in that argument to the later *Darden* decision. The latter is referred to only once in plaintiff's brief (31) and it is there discussed in one sentence.

It is submitted that the Virginia court in the *Massey* case recognized that the principle of that case should apply only where there was a denial of liability because of a condition broken; that although the defendant's clause states that in the event of suicide within two years, the policy shall be void, it further provides that the company will refund the premiums paid; that such a clause had the effect of limiting liability or making death from suicide a risk not assumed; that this clause is entirely different from a warranty not to engage in a forbidden

occupation as was involved in the *Massey* case; that the *Massey dictum* was qualified by the *Darden* "decision" to such an extent that the former is not even persuasive authority; and that consequently the defendant's clause is a valid limitation of liability within the meaning of Section 4228 of the Virginia Code.

Under the circumstances the defendant contends that there is no merit in any of the following arguments made by the plaintiff (brief, 12): (1) the language and conclusions of the court in the *Massey* case with respect to suicide are not *dicta;* or (2) even if they be *dicta*, they are "considered *dicta*"; or (3) they are at least "available data" as to what the Virginia law is.

The Circuit Court of Appeals has properly applied the Virginia law and its decision is plainly right.

(B) The "Decision" of the Circuit Court of Appeals Is Not in Conflict with the "Decision" in Badger v. Hoidale (C. C. A. 8th)

In order to assign another reason for allowance of the writ, the plaintiff claims (brief, 25-28) that the instant decision conflicts with the decision in *Badger* v. *Hoidale* (C. C. A. 8th), 88 Fed. (2d) 208, 109 A. L. R.798. Actually there in no conflict in the "decisions". In the *Badger* case, the question involved was whether or not a constitutional amendment which was not entirely self-executing had the effect of repealing a constitutional provision imposing double liability on stockholders of corporations. Although the state supreme court had not directly passed upon the effect of the constitutional amendment, it had said that the legislature, having in mind that the constitutional amendment abolished stockholders' double liability, no doubt enacted the

statute under consideration for the purpose of expediting settlement of the liability of stockholders in insolvent corporations. The Circuit Court of Appeals for the Eighth Circuit said that what the state court had said was "considered *dictum*" which should not be ignored.

But in the instant case, what the Virginia court said in the *Massey* case was not "considered" *dictum*. It was "pure" *dictum*. Even that was qualified by the later *Darden* "decision" to such an extent that it did not have even persuasive value. What Judge Parker said about not following *dictum* was itself *dictum* since the decision of his court was in fact based upon Virginia law. Under the circumstances there is no merit in plaintiff's contention.

The Virginia court did not hold, and the Circuit Court of Appeals did not admit that the Virginia court held, that "a suicide provision as in the instant case" worked a forfeiture, as claimed by plaintiff (brief, 26). The suicide clause in the *Massey* policy and the one in the instant case are entirely different. Here there is a return of premiums paid. Although the Virginia court discussed suicide cases, its attention was not directed to the point here involved.

(C) The Decision of the Circuit Court of Appeals Does Not Conflict with the Decision of this Court in Hawks v. Hamill

Plaintiff's argument (brief, 28-30) is to the effect that the decision of the Circuit Court of Appeals on a question of federal law conflicts with the decision of this Court in *Hawks* v. *Hamill*, 288 U. S. 52, 53 Sup. Ct. 240, 77 L. Ed. 610, in that the court ignored "considered *dictum*" of the Virginia court. Defendant's argument "B", *supra*, pages 17-18, is equally applicable here.

In the *Hawks* case, the respondents claimed a perpetual franchise to collect toll for the use of a bridge. The Oklahoma constitution prohibited perpetuities and monopolies. In holding that the franchise was a perpetuity, this Court pointed out that the Supreme Court of Oklahoma had said that a perpetual franchise is a forbidden perpetuity. This Court recognized that an opinion may be so framed that there is doubt whether a portion of it should be regarded as a "definitive holding" or as a "considered *dictum*". Mr. Justice Cardozo was of the opinion that what the state court had said was probably intended to be a definitive holding, but in any event it was a "considered *dictum*" and "not comment merely *obiter*". It is submitted that the situation in the instant case is entirely different and that the actual decision does not conflict with any decision of this Court.

The Circuit Court of Appeals recognized (118 Fed. (2d) at 419, R. 31) that it was its "duty to ascertain and apply the law of Virginia to the facts of the case; but *mere* dicta have *never* been received as *conclusive* evidence of the law of any state, and clearly they ought not be followed when opposed to what we regard as the sound and reasonable rule arising out of the common law of the state." (Italics supplied) The court very properly referred to *Carroll* v. *Carroll*, 57 U. S. 275 (16 How. 275), 14 L. Ed. 936.

(D) Circuit Court of Appeals Considered All "Available Data" as to What the State Law Is and Then Applied a State "Decision" which Qualified "Pure Dictum" in an Earlier Case

The plaintiff argues (brief, 30-33) that the Circuit Court of Appeals refused to consider all "available data"

as to what is the state law, which decision is contrary to *West* v. *American Telephone & Telegraph Co.*, 311 U. S. 223, 61 Sup. Ct. 179, 85 L. Ed. 146 (advance sheets); but there is no basis for this argument as the federal court applied the Virginia law. It stated that the *Massey dictum* had been qualified by the later *Darden* "decision", which involved the point in question, to such an extent that the *dictum* had no persuasive value. It added that "mere" *dicta* should *not* be considered "conclusive evidence" of the state law. Because the court said that such *dictum* should not be followed if it is opposed to what "we regard" as the common law of the state, the plaintiff tries to create the impression (brief, 30) that the court applied what it considered to be the "superior" rule from the point of view of "general law" instead of applying the "state" law. A mere cursory reading of Judge Parker's opinion demonstrates the fallacy of this argument.

The plaintiff apparently missed the point (brief, 30-31) of Judge Parker's reference to *Security Life Ins. Co. of America* v. *Dillard*, 117 Va. 401, 84 S. E. 656, Ann. Cas. 1917D, 1187, *supra*, page 5. That case was cited solely to show the manner in which Section 4228 of the Virginia Code should be construed.

The plaintiff's one reference to the *Darden* case is then made (brief, 31). The defendant's discussion of the case appears, *supra*, pages 14-17. It is unnecessary to reply to the arguments (brief, 31) that certain of Judge Parker's statements are inaccurate.

Plaintiff repeats (brief, 31-32) the statement frequently made by him that the Virginia court held in the *Massey* case that "the language which is present in the policies here involved" worked a forfeiture. But actually

the language of the policy in the *Massey* case was entirely different from that here involved. The *dictum* of that case was qualified by the later *Darden* "decision." The Circuit Court of Appeals considered the *Massey dictum* and correctly decided that it was not the Virginia law. It then applied the principle of the *Darden* case. *West* v. *American Telephone & Telegraph Co., supra*, page 20, was not overlooked by the Circuit Court of Appeals, which after quoting from *Carroll* v. *Carroll*, 57 U. S. 275 (16 How. 275), 14 L. Ed. 936, said (118 Fed. (2d) at 420, R. 32-33):

> "Nothing in recent decisions has in anywise weakened this rule or the sound basis of reason upon which it rests. In ascertaining the applicable law of the state, we are to consider court decisions and other available sources of local law; and we are to apply court decisions in the light of the well-established stare decisis rule and its limitations. Cf. West v. American Tel. & Tel. Co., 61 S. Ct. 179, 85 L. Ed.___. We are not required, however, to speculate as to how the state court might decide the question before us if it has not already decided it. Nor should we surrender our own judgment as to what the local law is on account of dicta or other chance expressions of the judges of the local courts. The respectful attitude towards the local court, where there has been no decision on the precise question before us, is to consider that question in the light of the common law of the state, with a view of reaching the decision which reason dictates, and with the faith that the local court will reach the same decision when the question comes before it."

(E) Decision of the Circuit Court of Appeals Does Not Involve Important Question of Federal Law which Has Not Been Decided by this Court

Plaintiff's argument (brief, 34) is predicated upon the false assumption that what the Virginia court said in the *Massey* case was "considered *dictum*". Actually it was "pure *dictum*" which had been qualified by the later *Darden* decision. The federal courts must apply the latest "decision" of the state court and not "pure" *dictum* in an earlier case which is no longer persuasive.

(F) The Request for Writ of Certiorari Should Be Denied

The petition and supporting brief present no real question. The opinion of the Circuit Court of Appeals is a complete answer to the only plausible question raised by the plaintiff (Point A), namely, whether or not the court applied the Virginia law. It expressly recognized that the law of Virginia controlled (118 Fed. (2d) at 417, 419, R. 26, 31) and pointed out that there is "nothing in the Virginia authorities to the contrary." (118 Fed. (2d) at 418, R. 29) In fact, its decision was in accordance with the holding of the Virginia court (118 Fed. (2d) at 419, R. 30). No "important" question of state law is involved; only the litigants are concerned.

The decision does not "conflict with the decision of another circuit court of appeals on the same matter." Neither does it "conflict with the applicable decisions of this Court." The decision does not involve an "important question of federal law which has not been, but which should be," decided by this Court. No import-

ant federal question is involved. The judgment for the defendant is plainly right and is in accordance with the law of Virginia.

CONCLUSION

In conclusion, it is respectfully submitted that for the foregoing reasons the petition for a writ of certiorari should be denied.

Respectfully submitted,

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